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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF:
K.B., K.S.B. and J.B., Minors,

SABRINA BYRD,

Appellant-Respondent,

VS.

LAKE COUNTY DEPARTMENT OF
CHILD SERVICES and
LAKE COUNTY COURT APPOINTED
SPECIAL ADVOCATE.

Appellees-Petitioners.

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No. 45A03-0607-JV-301

APPEAL FROM THE LAKE SUPERIOR COURT

The Honorable Mary Bonaventura, Judge

Cause No. 45D06-0504-JT-54

Cause No.45D06-0506-JT-72

Cause No.45D06-0508-JT-81

February 6, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Sabrina Byrd (“Mother”) appeals the termination of her parental rights as to her minor sons, K.B., K.S.B. and J.B.

We affirm.

ISSUES

1. Whether the trial court’s findings are clearly erroneous.
2. Whether the discontinuation of services deprived Mother of due process.

FACTS

On or about September 10, 2003, the Lake County Office of Family and Children (the “OFC”) received a referral, alleging neglect of Mother’s five minor children, including K.S.B., born on February 3, 1995, and K.B., born on January 28, 2000. The case was assigned to Twan Stokes, a case manager for the OFC. Upon visiting Mother’s home, Stokes determined that the home lacked a working stove and refrigerator and contained almost no furniture. The home was “in disarray” and smelled strongly of urine. (Tr. 13). Stokes arranged services for Mother, through which Mother obtained a stove, refrigerator and beds for the children.

On November 19, 2003, Mother left a message for Stokes, informing her that she was moving. Mother, however, did not leave a forwarding address or telephone number. Despite several attempts, Stokes could not locate Mother. Stokes finally located Mother in February of 2004 after Mother provided a public assistance worker with her new

address. Stokes visited Mother's new home on February 9, 2004, "and found that there were no beds in the home," and "there was no working refrigerator or stove in the home at that time." (Tr. 17).

The OFC removed K.B. and K.S.B. and placed them in foster care.¹ The OFC recommended that Mother receive a psychological evaluation, drug and alcohol evaluations, and counseling. The OFC also recommended supervised visitation. Following a hearing on February 12, 2004, the trial court made K.B. and K.S.B. temporary wards of the OFC.

On or about April 27, 2004, the OFC submitted a report to the trial court. In that report, the OFC recommended a case plan, pursuant to which Mother was "to make herself available for services"; "attend, participate and complete parenting classes"; "submit to random drug screens"; "continue counseling"; and "visit with children on a consistent basis." (Mother's App. 64).

The trial court held its initial hearing on May 10, 2004, at which Mother admitted "the material allegations" of the CHINS petition. (Mother's App. 35). The trial court made K.B. and K.S.B. wards of the OFC, retroactive to February 12, 2004, and entered a parental participation decree. The trial court ordered Mother to "fully participate in the services, treatment and/or supervision specified in the case plan adopted" and set a review hearing on October 18, 2004. (Mother's App. 35).

¹ Mother's three other children also were removed. The fathers of K.B. and K.S.B. could not be located.

Mother gave birth to J.B. on June 11, 2004. On or about June 25, 2004, the OFC took J.B. into protective custody after determining that, despite having AIDS during her pregnancy, Mother received prenatal care only once during her pregnancy and failed to inform medical personnel that she had AIDS. J.B. subsequently tested positive for HIV. The OFC placed J.B. with a foster family.

As to J.B., the OFC submitted a report to the trial court on or about September 14, 2004. The report included a case plan, pursuant to which Mother was “to continue counseling”; “continue to visit with [J.B.] weekly”; and “remain in contact with [the OFC]” (Mother’s App. 60). Following an initial hearing on September 27, 2004, the trial court determined J.B. to be a CHINS, adopted the OFC’s case plan and ordered Mother to “fully participate in the services, treatment and/or supervision ordered for [J.B].” (Mother’s App. 41).

In October of 2004, the OFC submitted a case plan, recommending that K.B., K.S.B. and J.B. remain in their foster homes. On October 18, 2004, the trial court held a review hearing, after which it adopted “a Permanency Plan as follows: Reunification with [Mother].” (CASA’s App. 54). The trial court amended the case plan “as follows: [J.B.] may be returned to [Mother]’s care as soon as possible. [K.B.] and [K.S.B.] are to remain in foster care until the week of October 25, 2004, at which time they may be placed with [Mother].” (CASA’s App. 54). The trial court scheduled a review hearing on the permanency plan for February 16, 2005.

The OFC returned J.B. to Mother on October 22, 2004 and arranged to return Mother’s three older children on October 28, 2004 and K.B. and K.S.B. on October 29,

2004. Mother, however, “never showed up” when the case manager assigned to the children, Betty Hanley, attempted to return the older children on October 28th. (Tr. 52). When Hanley went to Mother’s home on October 29th, she discovered that Mother had moved. Eventually, Mother provided Hanley with her new address. When Hanley went to that address, however, she was told that Mother did not live there.

Hanley contacted Mother’s public assistance worker and determined that Mother would be meeting with the public assistance worker on November 8, 2004. When Mother arrived for her appointment, Hanley removed J.B. from Mother’s care and placed him with his former foster parents.

On February 16, 2005, the trial court held a review hearing of the children’s cases, at which Mother did not appear. Following the hearing, the trial court found the following:

It is in the best interests of the child(ren) for the Court to maintain jurisdiction to complete the objectives of the Dispositional Decree or to effectuate the Permanency Plan.

For [K.B., J.B. and K.S.B.] reasonable efforts to reunify the children with [Mother] or to preserve the family are not required because the children are [] CHINS and it is in the best interests of the children to adopt or Order the preparation of a permanency plan which does not include reunification or preservation services for the family as there has been no showing that such services would be successful.

(Mother’s App. 66). The trial court then adopted the following permanency plan: “Termination of parental rights and adoption for [J.B.] and [K.B]. Termination of parental rights and adoption or graduation from high school with independent living skills for [K.S.B].” (Mother’s App. 66).

The OFC filed petitions to terminate Mother's parental rights as to K.B., K.S.B. and J.B. on April 6, 2005, June 30, 2005 and August 19, 2005, respectively. The trial court held an initial hearing on the petitions on September 22, 2005. On January 11, 2006, the trial court held a fact-finding hearing, a continuance of which the OFC requested to allow Mother an additional opportunity to comply with the case plan. The trial court granted the continuance.

Following the continued hearing on May 3, 2006, the trial court issued its order, terminating Mother's parental rights as to K.B., K.S.B. and J.B. As to K.B. and K.S.B., the trial court found, among other things, as follows:

The child(ren) has been removed from their parent(s) for at least six (6) months under a dispositional decree(s) of this Court dated May 10, 2004

There is a reasonable probability that the conditions resulting in the removal of the child[ren] from their parents' home will not be remedied in that: The Court finds that [J.B.] was placed out of the home on June 24, 2004, and was returned home in September of 2004, and then removed once again in October of 2004, and has not been returned home since that time.

[K.B.] and [K.S.B.] were placed out of the home on February 9, 2004, and have never been returned to parental care.

Mother was resistant to services; such as counseling and assistance to obtain suitable housing, which she refused.

Mother has had several residences during the pendency of this matter.

Mother attempted to abduct the children from school the same day the Court denied her visitation, due to lack of participation and lack of compliance with the case plan.

The children have been in counseling and need continued counseling to deal with issues relating to [M]other's non-compliance.

The children have bonded with the foster parents, and need a stable loving home.

Mother has shown little interest in regaining custody of her children. Mother, oftentimes, made no contact with the agency for several months.

Mother has not been cooperative with the service providers. Mother's visitation with her children has been sporadic.

Mother . . . ha[s] not provided any emotional or financial support for the child[ren].

Mother has not fully complied with the case plan.

* * *

There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child[ren] in that: For the same reasons stated above.

Termination is in the best interest of the child[ren] in that: Children need a permanency plan. Children need a nurturing, loving, caring, drug free and safe adoptive home. . . . Mother has been unable to provide a stable residence. Mother has not been compliance [sic] with the case plan.

The [OFC] has a satisfactory plan for the care and treatment of the child[ren] which is Placement in a permanent adoptive home environment. Supervision in placement, pending the granting of an adoption.

(Mother's App. 68-69). As to J.B., the trial court found, in pertinent part, as follows:

The child[] has been removed from his parent(s) for [at] least six (6) months under a dispositional decree[] of this Court dated September 27, 2004

There is a reasonable probability that the conditions resulting in the removal of the child from his parents' home will not be remedied in that: The Court finds that the child was placed out of the home on June 24, 2004, and was returned home in September of 2004, and then removed once again in October of 2004, and has not been returned home since that time.

Siblings were placed out of the home on February 9, 2004, and have never been returned to parental care.

Mother was resistant to services; such as counseling and assistance to obtain suitable house, which she refused.

Mother has had several residences during the pendency of this matter.

* * *

The child[] ha[s] been in counseling and need[s] continued counseling to deal with issues relating to [M]other's non-compliance.

The child[] ha[s] bonded with the foster parents, and need[s] a stable loving home.

Mother has shown little interest in regaining custody of her child[]. Mother, oftentimes, made no contact with the agency for several months.

Mother has not been cooperative with the service providers. Mother's visitation with her child[] has been sporadic.

Mother . . . ha[s] not provided any emotional or financial support for the child.

Mother has not fully complied with the case plan.

* * *

There is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child in that: For the same reasons stated above.

Termination is in the best interest of the child in that: Child needs a permanency plan. Child needs a nurturing, loving, caring, drug free and safe adoptive home. . . . Mother has been unable to provide a stable residence. Mother has not been compliance [sic] with the case plan.

The [OFC] has a satisfactory plan for the care and treatment of the child which is Placement in a permanent adoptive home environment. Supervision in placement, pending the granting of an adoption.

(Mother's App. 71-72).

DECISION

Although parental rights are of a constitutional dimension, the law allows for termination of these rights when parties are unable or unwilling to meet their responsibility. *In re A.N.J.*, 690 N.E.2d 716, 720 (Ind. Ct. App. 1997). The purpose of termination of parental rights is not to punish parents but to protect children. *In re L.S.*, 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), *trans. denied, cert. denied*, 534 U.S. 1161 (2002).

1. Trial Court's Findings

Mother challenges several of the trial court's findings. In reviewing the termination of parental rights, we will neither reweigh the evidence nor judge the credibility of witnesses. *Bester v. Lake County Office of Family and Children*, 839 N.E.2d 143, 147 (Ind. 2005). We consider only the evidence most favorable to the judgment. *Id.* Where the trial court has entered findings of fact and conclusions of law, we apply a two-tiered standard of review. *Id.* We must determine whether the evidence supports the findings and then whether the findings support the judgment. *Id.* We will set aside a judgment terminating a parent-child relationship only if it is clearly erroneous. *Id.* A judgment is clearly erroneous if the findings do not support the conclusions or the conclusions do not support the judgment. *Id.*

When a county office of family and children seeks to terminate parental rights, the office must plead and prove in relevant part that:

- (B) there is a reasonable probability that:
 - (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

- (ii) the continuation of the parent-child relationship poses a threat to the well-being of the child;
- (C) termination is in the best interests of the child; and
- (D) there is a satisfactory plan for the care and treatment of the child.

Ind. Code § 31-35-2-4(b)(2). These allegations must be established by clear and convincing evidence. *A.N.J.*, 690 N.E.2d at 720. Because subsection (b)(2)(B) is written in the disjunctive, however, the trial court need find only one of the two elements by clear and convincing evidence. *Bester*, 839 N.E.2d at 153 n.5.

As to subsection (b)(2)(B)(i), “it is not just the basis for the initial removal of the child that may be considered for purposes of determining whether a parent’s rights should be terminated, but also those bases resulting in the continued placement outside of the home.” *In re A.I.*, 825 N.E.2d 798, 806 (Ind. Ct. App. 2005), *trans. denied*. To determine whether the conditions are likely to be remedied, the trial court must examine the parent’s fitness to care for the child “as of the time of the termination hearing and take into account any evidence of changed conditions.” *In re S.P.H.*, 806 N.E.2d 874, 881 (Ind. Ct. App. 2004). The trial court, however, also must determine whether there is a substantial probability of future neglect or deprivation, which it may do by evaluating “the parent’s habitual patterns of conduct” *Castro v. State Office of Family and Children*, 842 N.E.2d 367, 373 (Ind. Ct. App. 2006), *trans. denied*.

For the “best interest of the child” statutory element, the trial court is required to consider the totality of the evidence and determine whether the custody by the parent is wholly inadequate for the child’s future physical mental, and social growth. *In re J.K.C.*,

470 N.E.2d 88, 91 (Ind. Ct. App. 1984). In making this determination, the trial court must subordinate the interest of the parent to that of the child involved. *Id.*

Mother asserts that there is no evidence to support the trial court's findings that she "was resistant to services; such as . . . assistance to obtain suitable housing, which she refused," and that she "has had several residences during the pendency of this matter." (App. 68, 71). We disagree.

Stokes testified that Mother moved soon after the OFC received its initial referral but failed to leave a forwarding address for the OFC. When Stokes discovered Mother's new address and visited Mother, Mother had discarded several items provided with the assistance of OFC.

Although Hanley acknowledged that Mother had been living in her current residence for almost year, she testified that Mother "had moved three times" and at the time of the termination hearing, was living in "her fourth . . . residence since the case opened" (Tr. 44). Moreover, the OFC presented evidence that Mother often failed to inform them when she moved, and on at least one occasion, provided the OFC with an incorrect address. Furthermore, evidence shows that the OFC attempted to reunify Mother and her older children but could not because Mother had moved without informing the OFC.

Theresa Dennie, a therapist providing services to Mother through Metropolitan Oasis Community Development ("MOCD"), testified that MOCD requested and received "a referral for case management services to assist" Mother in finding housing, but Mother "was not willing to accept the assistance" (Tr. 75-76). Dennie further testified that

at one point, MOCD closed Mother's case because they "could not locate [Mother]. She moved . . . [they] didn't know where she was." (Tr. 79). We find that the evidence presented supports the trial court's findings.

Next, Mother asserts that the evidence does not support the trial court's finding that she failed to provide emotional or financial support. Regarding visitation, Hanley testified that Mother "was sporadic" (Tr. 56). Hanley further testified that Mother "would come sometime[s]; sometime[s] she wouldn't. She'd call sometimes, and sometimes, she would just not show up" (Tr. 56). Hanley also testified that prior to placing K.B. and K.S.B. back with Mother, the OFC attempted to institute weekend visits between Mother and K.B. and K.S.B. K.B. and K.S.B., however "never got a chance to visit on the weekend" because "[w]hen the [agency] homemaker would transport the children from their foster home to [Mother's] home, [Mother] wasn't at home." (Tr. 52).

Dana Gritters, the therapist for K.B., K.S.B. and J.B., testified that K.B. and K.S.B. informed her that in November of 2005, Mother "showed up at the school" attended by K.B. and K.S.B., and "[Mother] told them that they were to go with [her]. . . . [S]he was there to take them." (Tr. 89). Gritters testified that this encounter with Mother left K.S.B. "very, very angry. . . . [H]e expressed being very scared, that in the event something would have happened, he didn't know what to do." (Tr. 88). Gritters testified that K.B. "proceeded to sit on [Gritters'] lap and cry for approximately 20 minutes . . . he was so upset, but he repeated over and over that he didn't really understand." (Tr. 88). Gritters further testified that she felt termination of Mother's parental rights would be in the children's best interest because Mother could not offer

them stability. We find that the evidence supports the trial court's findings that Mother failed to provide emotional support to the children.

Regarding financial support, Hanley testified that, other than buying them "some clothing items . . ." (Tr. 58), Mother did not provide the children with financial support, despite the OFC allowing Mother to "keep the children's [social security] benefits . . ." rather than taking the benefits "for reimbursement of money spend for foster care payments." (Mother's App. 56). Thus, the evidence supports the trial court's finding that Mother failed to support the children. To the extent, however, that this finding implies that Mother was able and legally required to provide support for K.B., K.S.B. and J.B., it is unsupported by the evidence.

Mother also asserts that the evidence does not support the trial court's finding that she "has shown little interest in regaining custody of her children." (Mother's App. 69, 72). We disagree.

Hanley testified that Mother "wasn't compliant when it came to her services and remaining stable . . ." (Tr. 44). Hanley also testified extensively about Mother failing to remain in contact with the OFC and Mother missing visits with the children. Hanley further testified that Mother was not at home and could not be located when the OFC attempted to return Mother's three older children, which resulted in the OFC discontinuing reunification efforts with K.B. and K.S.B. and again making J.B. a ward of the OFC. Hanley testified that Mother "was sporadic in the counseling" and "wasn't cooperative in her counseling" and agreed that Mother sporadically complied with the case plan. (Tr. 53, 54). Although Dennie testified that Mother began to cooperate during

her counseling sessions, she began to do so only after her last referral to MOCD, which was “in May ‘05.” (Tr. 78). We cannot say that the trial court’s finding that Mother showed little interest in regaining custody of her children is without evidentiary support.

Upon review, we find that the OFC established its allegations against Mother by clear and convincing evidence. Such evidence supports the trial court’s findings that the conditions that resulted in the removal of K.B., K.S.B. and J.B. will not be remedied and that termination in the best interests of the children.

2. Due Process

Mother asserts that the trial court’s decision to terminate her parental rights should be reversed because the trial court’s suspension of services to Mother in February of 2005 deprived Mother of due process.² Appellees, the OFC and the Lake County Court Appointed Special Advocate (“CASA”) Program, respond that Mother has waived her due process challenge because she failed to object to the alleged errors during the CHINS proceeding and did not raise her due process claim to the trial court at the termination stage.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that “no person shall be deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV. A parent’s right to raise his or

² We note that Mother claims that “[a]ll services previously ordered for reunification were stopped, including visitation between Mother and children.” Mother’s Br. 18. The trial court’s order, however, clearly provides for supervised visitation. Mother also argues that “she was deprived of the ability to present to the court evidence of her fitness to parent at the time of the termination hearing.” Mother’s Br. 19. We disagree as Mother testified at the hearing.

her children is protected by the Due Process Clause. *McBride v. Monroe County Office of Family and Children*, 798 N.E.2d 185, 194 (Ind. Ct. App. 2003).

“It is well established, however, that a party on appeal may waive a constitutional claim.” *Id.* Generally, a party waives a claim when it is raised as an issue for the first time on appeal. *Id.*

In this case, Mother neither objected to the trial court’s permanency plan, nor did she argue during the termination proceedings that the plan constituted a due process violation. Rather, she raised the alleged due process violation for the first time on appeal. Accordingly, Mother has waived her constitutional challenge.

Waiver notwithstanding, we shall address Mother’s claim. “[T]he provision of family services is not a requisite element of our parental rights termination statute, and thus, even a complete failure to provide services would not serve to negate a necessary element of the termination statute and require reversal.” *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); *see also In re B.D.J.*, 728 N.E.2d 195, 201 (Ind. Ct. App. 2000) (finding that the law concerning termination of parental rights does not require the OFC to offer services to parents). Thus, we find no violation of Mother’s due process rights where the trial court suspended services to Mother.

Affirmed.

BAKER, J., and ROBB, J., concur.